Low Pek Nai v Koh Chye Guan

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–970–1993
MOHD HISHAMUDIN J
31 OCTOBER 1994

Family Law *— Children — Custodianship — Application by natural mother — Whether court has jurisdiction to hear application for custody of illegitimate children under the Guardianship of Infants Act 1961 — Guardianship of Infants Act 1961*

The plaintiff applied under the Guardianship of Infants Act 1961 ('the Act') for the custody of her two illegitimate infant children. The application was uncontested as the defendant failed to enter appearance. The court, however, had to decide whether it has jurisdiction to hear such an application.

Held, allowing the application:

The Act does refer to illegitimate children and such reference can be found in s 1(3) which contemplates that the state legislature may provide for the Act to be applicable to Muslim children regardless of whether a child is legitimate or illegitimate to the extent that such an application is not contrary to Islamic law. If s 1(3) contemplates such an application as regards Muslim children, the Act must apply to children generally, legitimate or illegitimate. The court thus has jurisdiction to hear the application and granted custody of the two children to the plaintiff.

[Bahasa Malaysia summary

Plaintif telah memohon di bawah Akta Penjagaan Budak 1961 ('Akta itu') untuk jagaan dua orang anak tak sah tarafnya yang masih budak. Permohonan itu tidak dicabar kerana defendan gagal memasukkan kehadiran. Mahkamah, walau bagaimanapun, terpaksa memutuskan sama ada ia mempunyai bidang kuasa untuk mendengar permohonan sedemikian.

Diputuskan, meluluskan permohonan itu:

Akta itu ada membuat rujukan kepada anak tak sah taraf dan rujukan sedemikian boleh didapati di dalam s 1(3) yang membayangkan bahawa dewan undangan negeri boleh membuat peruntukan supaya Akta itu terpakai kepada kanak-kanak Islam, tidak kira sama ada kanak-kanak itu adalah sah atau tak sah taraf setakat mana pemakaian sedemikian tidak melanggar undang-undang Islam. Jika s 1(3) membayangkan pemakaian sedemikian kepada kanak-kanak Islam, Akta itu mestilah terpakai kepada kanak-kanak secara am, sah atau tak sah taraf. Mahkamah, oleh itu, mempunyai bidang kuasa untuk mendengar permohonan itu dan memberikan jagaan kedua orang anak itu kepada plaintif.]

Cases referred to

Balasingam & Paravathy, Infants; Kannamah v Pillay, Re [1970] 2 MLJ 74 (not folld)
CT (an infant), Re [1957] Ch 48; [1956] 3 All ER 500; [1956] 3 WLR 826 (refd)
Miskin Rowter, Re [1963] MLJ 341 (refd)
T v O [1993] 1 MLJ 168 (refd)

Legislation referred to

Guardianship of Infants Act 1961 s 1(3)
Guardianship of Infants Ordinance (Cap 16)
Guardianship of Infants Acts 1886 and 1925 [UK]

Khoo Soo Eng (*Khoo Soo Eng*) for the plaintiff.

Cur Adv Vult

Mohd Hishamudin J: This is an application by a natural mother (the plaintiff) under the Guardianship of Infants Act 1961 ('the Act') for the custody of her two illegitimate infant children. She had been living together with the putative father (the defendant), and as a result of their relationship, she bore him two children, a boy and a girl. The defendant later left the plaintiff and the children for another woman whom he subsequently married. Ever since the defendant left her, the plaintiff has been supporting the children without any financial assistance from the former.

The defendant appears not to be interested in contesting this application; for although duly served with the originating summons, he has failed to enter appearance as well as to attend this hearing.

Before *Re Balasingam & Paravathy, Infants; Kannamah v Pillay* [1970] 2 MLJ 74, our courts had always assumed that they had the jurisdiction under the Act to entertain an application of this nature and to make such order as the court deemed fit. For example, in *Re Miskin Rowter* [1963] MLJ 341, which was an application by a natural mother for custody of her illegitimate children under the Guardianship of Infants Ordinance (Cap 16), the court, acting on such an assumption, granted custody of the children to the mother.

However, in a subsequent case, this assumption was held to be erroneous by the court. For in *Re Balansingam*, it was held by Raja Azlan Shah J that the High Court has no jurisdiction to hear an application by an unwed mother for the custody of her illegitimate children under the Act because the Act does not apply to illegitimate children. In that case, his Lordship, after referring to the law of England, in particular, the Guardianship of Infants Acts 1886 and 1925, and the English case of *Re CT (an infant)* [1957] Ch 48; [1956] 3 All ER 500; [1956] 3 WLR 826 said [1970] 2 MLJ 74 at p 75:

> It is therefore quite settled that the law of England in 1956 was that neither the putative father nor the de facto mother of an illegitimate infant can make an application to the court for an order of custody.

The issue now arises as to whether this law is still applicable here or whether it has been modified by local legislation or case law. A

The Guardianship of Infants Act 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the above-mentioned s 1(2)(a), would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words 'father' and 'mother' in ss 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v Galloway* [1955] 3 All ER 429, it is safer to say that 'infant' means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words 'father', 'mother' or 'infant' can be construed to mean illegitimate infant or the de facto parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children. B C

The learned judge decided not to follow the decison in *Re Miskin Rowter* on the grounds that that case was not authority on the issue whether or not the Act applies to illegitimate children. According to his Lordship, the court in that case proceeded on the assumption that the Act applies and, therefore, it had the jurisdiction to hear the application in question. D

There is some support for the decison in *Re Balasingam* in the subsequent case of *T v O* [1993] 1 MLJ 168. E

With greatest respect to the views of the learned judge in *Re Balasingam*, in the present case, I propose to adopt a different view. Unlike the English Acts, our Act does refer to illegitimate children and such reference can be found in the application section. Section 1(3) states:

Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that — F

(a) nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an *illegitimate child*, whose mother so professes or professed that religion; and ... (Emphasis added.) G

The above provision, it will be noted, contemplates that the state legislature may provide for the Act to be applicable to Muslim children regardless of whether the child is *legitimate or illegitimate* to the extent that such an application is not contrary to Islamic law. Now, if this provision contemplates such an application as regards Muslim children, then, in my view, the Act itself must apply to children generally, legitimate or illegitimate. H

I, therefore, rule that the Act applies also to illegitimate children and that, in the present case, I have the jurisdiciton to hear the application. Accordingly, I grant this application for custody of the two children to the plaintiff. I

Application allowed.

Reported by Kevin Ooi